Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–01–85 OF 1999

GOPAL SRI RAM, HAIDAR AND ABDUL HAMID MOHAMAD JJCA

24 MARCH 2001

Administrative Law *— Rights and liabilities of public servants — Rules of natural justice — Dismissal from police force, whether dismissal wrongful — Appellant was not informed of possibility of dismissal if found guilty — Police (Conduct and Discipline) (Junior Police Officer and Constables) Regulations 1970 — Public Officers (Conduct & Discipline) Regulations 1993, reg 28*

Public Servants *— Dismissal — Natural justice — Appellant was not informed of possibility of dismissal if found guilty — Procedural fairness — Breach of — Police (Conduct and Discipline) (Junior Police Officer and Constables) Regulations 1970 — Public Officers (Conduct & Discipline) Regulations 1993, reg 28*

Statutory Interpretation *— Subordinate legislation — Repeal of — Addendum — Police (Conduct and Discipline) (Junior Police Officer and Constables) Regulations 1970 — Public Officers (Conduct & Discipline) Regulations 1993, reg 28*

The appellant was a lance corporal in the police force. He was dismissed from the force upon being convicted of three charges of misconduct. He brought an action for a declaration that the dismissal was void because he did not get a fair procedure. However, the application was dismissed by the learned trial judge. The appellant's case comes under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the 1970 Regulations'). The respondents did not, at the time they served the charges on the appellant, inform him that he might be dismissed from service. The 1970 Regulations do not contain any express provision requiring the respondents to so inform a junior police officer but reg 28 of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations') does contain such a requirement. The 1993 Regulation finds its origins in The Public Officers (Conduct and Discipline) (Chapter 'D') General Order ('Cap D'). The 1993 Regulations (which repealed and replaced Cap D) do not apply to junior police officers. Before the 1993 Regulations came into force, the discipline of senior police officers was governed by Cap D. But an Addendum A 207 ('the Addendum') in the Inspector General's Standing Orders provided where certain provision under General Orders Cap D are not expressly provided for under the 1970 Regulations, such provisions under General Orders Cap D shall be applicable to junior police officers and constables. The appellant argues that the beneficial provisions in the 1993 Regulations, in particular reg 28, should be extended to junior police officers as well.

Held, allowing the appeal:

(1) The intention of the relevant authority was to ensure that the same extent of procedural fairness that was available to senior police officers was made available to junior police officers. There was, therefore, at all material times, a legitimate expectation vested in junior police officers that the beneficial provisions of the former equipollent of reg 28(1) of the 1993 Regulations would continue to be extended to them (see pp 263I–264A).

(2) Procedural fairness would continue to be ensured only if the procedure prescribed by reg 28 of the 1993 Regulations is continued to be made available to all junior police officers. Once a particular practice has been adopted, discontinuance of it without prior consultation with those adversely affected by such discontinuance fatally flaws a determination arrived at in consequence thereof. Any other conclusion would offend the joint operation of arts 5(1), 8(1) and 135(2) of the Federal Constitution and there would be an unfair deprivation of procedural fairness (see p 264F–G).

(3) The fact that the plaintiff in *Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors* [1997] 2 MLJ 454 pleaded guilty whereas the instant appellant claimed trial was not a distinguishing factor of any significance upon the issue as to whether procedural fairness was meted out. What came across is that the letter to the appellant in the present instance did not bring to his attention the contemplated punishments to make him appreciate the gravity of the situation, and thus enabling him to give a satisfactory explanation as best as he could. That in itself amounts to deprivation of procedural fairness (see pp 264I–265B).

(4) Cap D was introduced in 1980 with General O 26 therein (similar to regulation 28 of the 1993 Regulations). On 15 November 1993, the 1980 Cap D was repealed and superseded by the 1993 Cap D. The provision of General O 26 in the new 1993 Cap D is similar to the provision of General O 26 in the 1980 Cap D. According to section 35(2) of the Interpretation Acts 1948 and 1967, as a matter of interpretative deduction any reference to Cap D in the Addendum must now refer to the later 1993 Cap D (see p 265C–F).

[**Bahasa Malaysia summary**

Perayu merupakan seorang lans koporal polis. Beliau dipecat kerana disabit kesalahan tiga dakwaan salah laku. Beliau mengambil tindakan untuk mendapatkan deklarasi bahawa pemecatan tersebut tidak sah kerana beliau tidak mendapat prosedur yang adil. Walau bagaimanapun, permohonan tersebut ditolak oleh hakim perbicaraan. Kes perayu berada di bawah Peraturan-peraturan Polis (Kelakuan

dan Disiplin) (Pegawai Polis Junior dan Konstabel) 1970 ('Peraturan-peraturan 1970'). Responden-responden tidak, pada ketika mereka mendakwa beliau, memberitahu beliau bahawa beliau mungkin dipecat. Peraturan-peraturan 1970 tidak mengandungi apa-apa peruntukan nyata yang memerlukan responden-responden memberitahu seorang pegawai junior sedemikian, tetapi peraturan 28 dari Peraturan-peraturan Pegawai Awam (Kelakuan dan Disiplin) 1993 ('Peraturan-peraturan 1993') mempunyai keperluan tersebut. Peraturan-peraturan 1993 berpunca dari Perintah Umum Pegawai Awam (Kelakuan dan Disiplin) (Bab D) ('Bab D'). Peraturan-peraturan 1993 (yang meminda dan menggantikan Bab D) tidak boleh dipakai terhadap pegawai polis junior. Sebelum Peraturan-peraturan 1993 mula dikuatkuasakan, disiplin pegawai polis senior ditadbir oleh Bab D. Tetapi satu Tambahan A 207 ('Tambahan tersebut') dalam Peraturan-peraturan Majlis Mesyuarat Inspektor Jeneral memperuntukkan bahawa di mana terdapat peruntukan di bawah Perintah Umum Bab D yang tidak diperuntukkan secara nyata di bawah Peraturan-peraturan 1970, peruntukan-peruntukan sedemikian di bawah Perintah Umum Bab D boleh dipakai terhadap pegawai polis junior dan konstabel. Perayu berhujah bahawa peruntukan bermanfaat dalam Peraturan-peraturan 1993, secara khususnya per 28, harus dilanjutkan juga kepada pegawai polis junior.

Diputuskan, membenarkan rayuan tersebut:

(1) Niat pihak berkuasa adalah untuk memastikan bahawa tahap keadilan prosedur yang sama dengan pegawai polis senior diberi juga kepada pegawai polis junior. Oleh itu, pada semua waktu yang material, satu harapan yang sah ada pada pegawai polis junior bahawa peruntukan bermanfaat peraturan 28(1) Peraturan-peraturan 1993 akan terus dilanjutkan kepada mereka (lihat ms 263I–264A).

(2) Keadilan prosedur hanya akan terus dipastikan jika prosedur yang ditentukan oleh peraturan 28 Peraturan-peraturan 1993 terus diberi kepada semua pegawai polis junior. Sebaik sahaja satu amalan khusus dipakai, pemberhentiannya tanpa terlebih dahulu membincangnya dengan mereka yang akan terjejas oleh pemberhentiannya akan menjejaskan keputusan yang dicapai sebagai akibat. Apa-apa kesimpulan yang lain akan menyalahi operasi bersama artikel-artikel 5(1), 8(1) dan 135(2) Perlembagaan Persekutuan dan akan terdapatnya penafian keadilan prosedur yang tidak adil (lihat ms 264F–G).

(3) Hakikat bahawa plaintif dalam *Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors* [1997] 2 MLJ 454 mengaku tidak bersalah manakala perayu dalam kes ini meminta bicara bukanlah satu faktor perbezaan yang penting bagi isu sama ada terdapatnya keadilan prosedural. Apa yang jelas ialah bahawa surat kepada perayu dalam kes ini tidak memberitahunya hukuman-hukuman yang dirancang yang menyedarkannya akan

seriusnya keadaan semasa, dan dengan itu membolehkannya memberikan penjelasannya sebaik yang mungkin. Ini merupakan satu penafian keadilan prosedur (lihat ms 264I–265B).

(4) Bab D diperkenalkan pada tahun 1980 dengan Perintah Umum 26 di dalamnya (serupa dengan peraturan 28 Peraturan-peraturan 1993). Pada 15 November 1993, Bab D 1980 dipinda dan digantikan oleh Bab D 1993. Peruntukan Perintah Umum 26 dalam Bab D 1993 yang baru serupa dengan peruntukan Perintah Umum 26 dalam Bab D 1980. Menurut seksyen 35(2) Akta-akta Tafsiran 1948 dan 1967, sebagai satu perkara tafsiran deduktif, apa-apa rujukan kepada Bab D di dalam Tambahan sekarang mestilah merujuk kepada Bab D 1993 yang kemudian (lihat ms 265C–F).

Notes

For cases on dismissal of public servants, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1525–1563.

For cases on rights and liabilities of public servants, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 502–556.

For cases on statutory interpretation of subordinate legislation, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1632–1647.

Cases referred to

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (refd)

Ekambaram a/l Savarimuthu v Ketua Police Daerah Melaka Tengah [1997] 2 MLJ 454 (folld)

Inspector General of Police v Alan Noor bin Kamat [1988] MLJ 260 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 MLJ 1 (refd)

R v Brent LBC ex parte Gunning [1985] 84 LGR 168 (refd)

R v British Coal Corporation, ex parte Vardy [1993] ICR 720 (refd)

Selvaras v Aziz Ariarasa Abdullah & Anor (Civil Suit No S1–21–170–98, unreported) (refd)

Legislation referred to

Federal Constitution arts 135(2), 5(1), 8(1)

Human Rights Act 1998 [Eng]

Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970

Public Officers (Conduct & Discipline) Regulations 1993

The Public Officers (Conduct & Discipline) (Chapter 'D') General Orders 1980

Appeal from: Suit No S2–21–166–1997 (High Court, Kuala Lumpur)

Karpal Singh (*Gobind Singh Deo* and *Ram Karpal Singh* with him) *(Karpal Singh & Co*) for the appellant.

Ahmad Kamal bin Md Shahid (Attorney General's Chambers) for the respondents.

Gopal Sri Ram JCA. (delivering judgment of the court): Of late, in a number of varying fact patterns, we have been asked to say whether a citizen has received procedural fairness. This is yet another such case.

The facts of this case have been dealt with in detail in the judgment appealed against. I will therefore not rehearse them here. A summary of such facts as are essential to the disposal of this appeal will suffice.

The appellant was a lance corporal in the police force. He faced four charges of misconduct. He was found guilty and convicted of three of those charges. He was dismissed from the force. He brought an action for a declaration that his dismissal was void because he did not get a fair procedure. To fully appreciate the arguments of counsel, it is necessary to have regard to some of the legislation that is applicable to a case at the present.

The appellant's case comes under the Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970 ('the 1970 Regulations'). The respondents did not, at the time they served the charges on the appellant, inform him that he might be dismissed from service. It is true that the 1970 Regulations do not contain any express provisions requiring the respondents to so inform a junior police officer, such as the appellant. But, reg 28 of the Public Officers (Conduct & Discipline) Regulations 1993 ('the 1993 Regulations') does contain such a requirement.

Now, this is what reg 28 of the 1993 Regulations says:

> 28 (1) The appropriate Disciplinary Authority sitting to consider a case where the breach of discipline complained of has been found to be of a nature which merits a punishment of dismissal or reduction in rank shall consider all the available information and where it appears that there is a prima facie case against the officer for dismissal or reduction in rank, the appropriate Disciplinary Authority shall direct that a statement containing the facts of the breach if discipline alleged to have been committed by the officer and any proposed ground on which the officer is to be dismissed or reduced in rank be sent to the officer and shall call upon him to make a written representation, containing grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days from the date of receipt of the charge.

The reg finds its origins on The Public Officers (Conduct & Discipline) (Chapter 'D') General Orders 1980 ('Cap D'). Its effect is not in doubt. The reg requires that there should be show cause letter that:

> 'must bring to the attention of the civil servant concerned of the contemplated punishments to make him appreciate the gravity of this situation and thus enable him to give a satisfactory explanation as best as he could' (per Salleh

Abas LP in *Inspector-General of Public v Alan Noor bin Kamat* [1988] MLJ 260 at p 261.)

The 1993 Regulations (which repealed and replaced Cap D) do not apply to junior police officers. They only apply to senior police officers, such as police inspectors. Before the 1993 Regulations came into force, the discipline of senior police officers was governed by Cap D. But an Addendum A 207 ('the Addendum') in the inspector general's standing orders provided as follows:

> However, where certain provisions under General Orders Cap 'D' are not expressly provided for under the Police Regulations 1970, such provisions under General Orders Cap 'D' shall be applicable to junior police officers and constables.

The appellant argued that the beneficial provisions in the 1993 Regulations, in particular, reg 28 of the 1993 Regulations, should be extended to junior police officers as well. He found this argument on two sources. First, from the decision in *Ekambaram a/l Savarimuthu v Ketua Police Daerah Melaka Tengah* [1997] 2 MLJ 454. Second, from the general requirement of procedural fairness which, for the purposes of the present case, is the joint product of art 135(2) read with arts 5(1) and 8(1) of the Federal Constitution.

Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah concerned the case of a junior police officer who was dismissed from service after he pleaded guilty to a charge of willfully disobeying a lawful order. Suriyadi J, in striking down the order of dismissal held the Addendum had the effect of extending the requirement in reg 28 of the 1993 Regulations to junior police officers. After setting out the Addendum, he proceeded as follows:

> In this context, the General Orders Cap 'D' is to be read as Bab D 1993 as this law had replaced the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980. By the construction of the above addendum, it will mean that as the procedure and safeguard similar to reg 28 of the 1993 Regulations of Bab D 1993 is not made available to a subject in PU (A) 86/70, then the contents of reg 28 of the 1993 Regulations will be applicable for the added benefit of the junior officers and constables. For purposes of our case, as it was contemplated that he would be dismissed, and was indeed dismissed, the applicant, pursuant to PU(A) 86/70 and reg 28 of the 1993 Regulations Bab D 1993, therefore, should have been informed of that contemplation.
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> By not informing him of the possible dismissal, the tribunal was in breach of the *audi alteram partem* rule (see *B Surinder Singh Kanda v The Government of Federation of Malaya* [1962] MLJ 169; *De Souza Lionel Jerome v AG* [1993] 1 SLR 882). Perhaps due to the lackadaisical attitude of the disciplinary board regarding the whole proceeding, the applicant did not take the matter too seriously and hence pleaded guilty. It must have shaken his whole moral fibre when he was informed of that sentence. It would not be unreasonable to remark that had he know of the outcome if found guilty, his approach and attitude to the whole proceeding would not have been that cavalier. He would

have come better prepared and probably afford a better explanation Certainly, he would not have pleaded guilty.

In *Selvaras v Aziz Ariarasa Abdullah & Anor* (Civil Suit No S1–21–170–98, unreported), Mohd Saari Yusoff J, refused to follow the decision in *Ekambaram*'s case on the ground that the 1970 Regulations forms a complete code with no room for the incorporation of reg 28 of the 1993 Regulations. An appeal in *Selvaras'* case is presently pending before this court.

Ekambaram's case was cited to the trial judge in the present instant case. But the learned trial judge declined to follow it. Instead, he purported to distinguish it on the rather narrow ground that the plaintiff in *Ekambaram* had pleaded guilty while in the instant appellant had claimed trial to the charge against him.

The present appeal is therefore, in reality, a test as to the correctness of the decision in *Ekambaram*'s case. But the global issue for resolution in the present instant is, as I observed at the outset, whether the appellant received procedural fairness in all the circumstances of the case.

Now, I have read and re-read the relevant passages in *Ekambaram*'s case with a view to appreciating the approach adopted by Suriyadi J. But I am, with respect, unable to agree with the interpretative process by which that learned judge came to his conclusion. For it is plain upon any view of statutory construction that the Addendum does not and cannot be read as referring to the 1993 Regulations. The Addendum in question applied to extend reg 28 of the 1993 Regulations only for so long as Cap D was in force. Once Cap D was replaced by the 1993 Regulations, Addendum abated. It ceased to have any effect. There was simply nothing on which the Addendum could bite. By no stretch of the imagination; or indeed of the English language; could it be argued that the words 'General Orders Cap 'D'' in the Addendum are to be read as referring to the 1993 Regulations. Neither is there anything in the language of the 1993 Regulations by way of a saving provision clearly pointing to an intention to keep alive the extension of reg 28 of the 1993 Regulations. I have therefore regretfully come to the conclusion that the reasoning adopted by Suriyadi J in *Ekambaram's* case is wrong.

But by no means am I therefore to be understood as saying that the result in *Ekambaram's* case was wrong. On the other hand, I am firmly of the view that the actual decision in that case was right. And I will, in a moment, give my reasons for saying so.

It is beyond argument that by its terms, reg 28 of the 1993 Regulations accords with procedural fairness. In truth, the non-compliance with its mandatory requirements will result in a dismissal being declared invalid. See *Inspector General of Police v Alan Noor bin Kamat*. It is in undoubted recognition of its beneficial effects that the Addendum extended it to junior police officers.

Put another way, the intention of the relevant authority was to ensure that the same extent of procedural fairness that was available to senior

police officers was made available to junior police officers. There was, therefore, at all material times, a legitimate expectation vested in junior police officers (including the present appellant) that the beneficial provisions of the former equipollent of reg 28 of the 1993 Regulations would continue to be extended to them. In my judgment, the decision in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, *R v Brent LBC ex parte Gunning* [1985] 84 LGR 168 and *R v British Coal Corporation, ex parte Vardy* [1993] ICR 720, all exemplify the application of the doctrine of legitimate expectation at English common law. They support the proposition that once a particular practice has been adopted, discontinuance of it without prior consultation with those adversely affected by such discontinuance fatally flaws a determination arrived at in consequence thereof.

Now, England (until the recent introduction of the Human Rights Act 1998) had nothing even remotely equivalent to a charter on human rights. By contradistinction, we have, in our Federal Constitution, guaranteed liberties that, when appreciated in their proper concept, are the essence of human rights enjoyable at the instance of our citizens. The English requirement of legitimate expectation is therefore one of the constituents of the doctrine of procedural fairness which, so far as concerns members of the civil service, is to be found in the joint operation of arts 5(1), 8(1) and 135(2) of the Federal Constitution ('the Constitution'). It follows that a decision, which in England, will be quashed as offending the principle of legitimate expectation, will in our jurisdiction be set aside under the much broader doctrine of procedural fairness. I may add here that the doctrine of legitimate expectation has the effect of conferring both substantive rights as well. See *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 MLJ 1.

Thus, displaying reg 28 of the 1993 Regulations on the ground that the Addendum had ceased to be ceased to be of relevance with the coming into force of the 1993 Regulations would deprive junior police officers of an important facet of procedural fairness that had previously been enjoyed by them. Procedural fairness would continue to be ensured only if the procedure prescribed by reg 28 of the 1993 Regulations is continued to be made available to all junior police officers. Any other conclusion would offend the joint operation of arts 5(1), 8(1) and 135(2) of the Constitution and there would be an unfair deprivation of procedural fairness. Accordingly, Suriyadi J, was entirely correct in holding that the plaintiff in *Ekambaram's* case was entitled to receive a notification as prescribed by reg 28 of the 1993 Regulations.

Turning to *Selvaras'* case, the less I say about it the better. It is, as I have already pointed out, under appeal. Suffice to say that once *Ekambaram* is accepted as having been correctly decided, the logical conclusion is that *Selvaras's* case is wrong because it cannot stand alongside *Ekambaram*.

That brings me to the present appeal which, in my view, is governed by *Ekambaram's* case. The fact that the plaintiff in *Ekambaram* pleaded guilty whereas the instant appellant claimed trial was not a distinguishing factor of

any significance upon the issue as to whether procedural fairness was meted out. The attempt by the judge in the court below to draw such a distinction was, with respect, an exercise in futility. What comes across is that the letter to the appellant in the present instance did not bring to his attention the contemplated punishments to make him appreciate the gravity of the situation, and thus enabling him to give a satisfactory explanation as best as he could. That in itself amounts to deprivation of procedural fairness.

Since writing this judgement in draft, I have had the benefit of reading the comments on it by my learned brother Abdul Hamid Mohamed JCA. I agree with him that there is another and better reason for holding for the appellant on this case. The answer lies in the historical antecedent to the written law governing discipline. The oldest of these are the 1970 Regulations. Cap D was introduced in 1980 with General Order 26 therein. On 15 November 1993, the 1980 Cap D was repealed and superseded by the 1993 Cap D. The provision of General Order 26 in the new Cap D is similar to the provision of General Order 26 in the 1980 Cap D. (One month later, the Police Officers (Conduct and Discipline) Regulations 1993 was introduced. Regulation 28 therein is similar to the provision of the General O 26. But, the 1993 Regulations are not relevant to the proceeding in this case since the 1993 Regulations apply to 'senior police officers' and the appellant is a 'junior police officer'). The question is whether the reference to the 1980 Cap D in the Addendum should be read as referring to the 1993 Cap D. Now that triggers s 35(2) of the Consolidated Interpretation Acts of 1948 & 1967. That section provides as follows:

> (2) Where any written law or any provision of a written law is repealed and re-enacted (with or without modification), references in any other written law to the law of provision so repealed shall be construed as references to the re-enacted law or provision.

It follows as a matter of interpretative deduction, that any reference to Cap D in the Addendum must now refer to the later 1993 Cap D.

For the reasons already given, this appeal succeeds. The decision of the court below is set aside. There shall be a declaration to the effect that the appellant's dismissal is null and void and of no effect. All other ancillary relief prayed for in the foot of the writ is granted. The respondents must pay the costs of this appeal and the proceedings in the court below.

My learned brothers Haidar Mohd Noor and Abdul Hamid Mohamad JJCA have seen this judgement in draft and have expressed their concurrence with the reasons herein.

Appeal allowed.

Reported by Benjamin Yong